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In the Supreme Court of the United States

October Term, 1931.

No. 677.

CONTINENTAL BAKING COMPANY, a corporation;
GENERAL BAKING COMPANY, a corporation;
SCHULZE BAKING COMPANY, a corporation, and
CARL WILKE, doing business as the WILKE BAKING COMPANY, *Appellants*,

vs.

HARRY H. WOODRING, as Governor of the State of Kansas; ROLAND BOYNTON, as Attorney General of the State of Kansas; JESSE W. GREENLEAF, THURMAN HILL and CHARLES W. CAMPBELL, as members of the Public Service Commission of the State of Kansas, *Appellees*.

BRIEF OF APPELLANTS.

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vs.

HARRY H. WOODRING, as Governor of the State of Kansas; ROLAND BOYNTON, as Attorney General of the State of Kansas; JESSE W. GREENLEAF, THURMAN HILL and CHARLES W. CAMPBELL, as members of the Public Service Commission of the State of Kansas, *Appellees*.

BRIEF OF APPELLANTS.

I.

Opinion of Court Below.

The opinion of the statutory three-judge Federal Court sitting as the District Court of the District of Kansas, First Division, is not yet officially reported but appears as *Continental Baking Co. et al.* v. *Woodring, Governor of*

Kansas, et al., in the 55th Federal Reporter, second series, at pages 347 to 359, inclusive, and in the printed record in this case at pages 26 to 46, inclusive.

II.

Jurisdiction.

On the 16th day of February, 1932, appellants filed their statement as to jurisdiction on appeal in this Court, and on the 28th day of March, 1932, this Court made a finding that probable jurisdiction was noted.

The statutory provisions relied upon to sustain jurisdiction in appellants' statement as to jurisdiction on appeal are in the Act of February 13, 1925, Chapter 229, Section I, 43 Stat. 936 and 938 (U. S. Code, Title 28, Sections 345 and 380, the same being Sections 238 and 266 of the Judicial Code as amended).

III.

STATEMENT.

This is an appeal from the decision of a statutory three judge court convened in the United States District Court for the District of Kansas, First Division.

The 1931 Legislature of the State of Kansas enacted a law known as Chapter 236 of the Laws of Kansas, 1931, pages 344-350, and entitled "Relating to Motor Carriers and to Transportation thereon over the Public Highways." (R. 11-19.) This act was duly approved March 16, 1931, published May 28, 1931, and took effect on July 1, 1931. (Copy of said act is attached to this brief as appendix "A.")

Section I of the Kansas Act classifies motor carriers as "public motor carriers of property," "contract motor carriers of property," "private motor carriers of property," "public motor carriers of passengers" and "contract motor carriers of passengers." (R. 11-12.)

This act lays a special tax, based on truck capacity and mileage upon the above enumerated carriers of persons and property, and subjects them to the rules and regulations of the Public Service Commission, and requires of them insurance, reports, and information covering public safety and other purposes.

On the 21st day of September, 1931, appellants filed a bill of complaint in the United States District Court for the District of Kansas, First Division, at Topeka, in which Harry H. Woodring, as Governor of the State of Kansas, Roland Boynton, as Attorney General of the State of Kansas, Jesse W. Greenleaf, Thurman Hill and Charles W. Campbell, as members of the Public Service

Commission of the State of Kansas, were made defendants. (R. 1-11.)

In the bill of complaint it is alleged that all of the appellants are engaged in the manufacturing of bread and other bakery products in plants owned by them, and delivered by their own trucks in the State of Kansas. That appellant Continental Baking Company is a Delaware corporation with its principal place of business in New York City, with plants owned by it in the City of Wichita, Kansas, and the City of St. Joseph, Missouri, and the City of Kansas City, Missouri; that appellant General Baking Company is a New York corporation with its principal place of business in the City of New York, with plants owned by it located in the City of Wichita, Kansas, City of Hutchison, Kansas, City of Kansas City, Kansas, and City of Kansas City, Missouri; that appellant Schulze Baking Company is an Illinois corporation, with its principal place of business in the City of Chicago, Illinois, with a plant owned and located in the City of Kansas City, Missouri, and that appellant Carl Wilke is an individual doing business as the Wilke Baking Company with a plant located in Beatrice, Nebraska. That all of the appellants are private motor carriers of property as defined by the provisions of the Act of Kansas. (R. 5-6.)

Appellants' bill of complaint attacks the constitutionality of Chapter 236 of the Laws of Kansas, 1931, on the ground that it violates the Fourteenth Amendment to the Constitution of the United States by exempting from the provisions of the Act: (a) Motor carriers who operate wholly within any city or village of the State; (b) Private motor carriers who operate within a radius of 25 miles beyond the corporate limits of such city or any village; (c) The transportation of live stock

and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle; and (d) The transportation of children to and from school.

Appellants' bill of complaint further attacks the constitutionality of Section 2 of the Act in conjunction with the other Sections of the Act in that it fails to define with a sufficient degree of certainty the obligation the State imposes upon appellants and subjects them to fines and imprisonment upon violation of the Act.

Appellants' bill of complaint attacks Section 5 of the Acts taken in conjunction with Sections 8, 16, 17, 19, 22 and 23 as unconstitutional and void in violation of the equal protection, due process and commerce clauses of the Constitution of the United States, in that it gives to the Public Service Commission powers over appellants, private carriers of property, and the right to issue rules and regulations, and make appellants common carriers.

Appellants' bill of complaint alleges that Section 21 of the Act denies the petitioners the privileges and immunities of the citizens of the several states as guaranteed by Article 4, Section 2, of the Constitution of the United States, and denies petitioners equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Appellants' bill of complaint alleges that the entire Act is unconstitutional and void in that by the Act the legislature of Kansas attempts to invade the power exclusively delegated to Congress by Article I, Section 8, Clause 3, of the Constitution of the United States.

On September 22, 1931, a temporary restraining order was issued. (R. 20.) On the 24th day of September, 1931, defendants filed a motion to dismiss the bill of complaint. (R. 21.) Upon motion the statutory three judge court

was convened (R. 24), and October 10, 1931, the case was heard by the judges convened in that court.

On December 15, 1931, a memorandum opinion was handed down by Judge McDermott, concurred in by Judge Hopkins, holding the Act constitutional, and dismissing petitioners' bill of complaint and dissolving the restraining order (R. 26-45), and a dissenting memorandum opinion by Judge Franklin E. Kennamer, holding that the Act was unconstitutional, and violated the law as last declared by the Supreme Court of the United States in *Smith* v. *Cahoon,* 283 U. S. 553. (R. 45-46.)

On the 6th day of January, 1932, the Court entered a decree dismissing the bill of complaint of appellants, dissolving the temporary restraining order heretofore issued, and denying appellants the relief prayed. (R. 46.)

On the 9th day of January, 1932, the appellants duly served and filed their petition for appeal, assignment of errors and prayer for reversal (R. 46-52), and on the 9th day of January, 1932, the court made an order allowing the appeal, and fixing the bond at $5,000, the bond to act as a supersedeas. (R. 52.) On the 9th day of January, 1932, appellants' bond was approved and filed (R. 53), and on the 9th day of January, 1932, appellants duly served and filed the citation for appeal, and on the 9th day of January, 1932, appellants duly served and filed their praecipe (R. 53-54), and on the 3rd day of February, 1932, appellants' appeal was duly filed with the Clerk of the Supreme Court of the United States, and the cause docketed as No. 677. On the 16th day of February, 1932, appellants duly served and filed their statements as to jurisdiction on appeal in this Court, and on the 28th day of March, 1932, this Court noted probable jurisdiction of the case.

IV.

SPECIFICATION OF ERRORS.

The assigned errors intended to be urged are:

1. The District Court of the United States for the District of Kansas, First Division, erred in sustaining defendants' motion to dismiss and dismissing petitioners' bill of complaint in the above entitled cause.

2. The District Court of the United States for the District of Kansas, First Division, erred in refusing petitioners the relief prayed for in their bill of complaint, in refusing petitioners the injunction prayed for, and in dissolving petitioners' temporary restraining order.

3. The District Court of the United States for the District of Kansas, First Division, erred in the memorandum opinion of the Honorable George T. McDermott, Circuit Judge, and the Honorable Richard J. Hopkins, District Judge, declaring Chapter 236 of the Laws of Kansas, 1931, constitutional when the provisions of said act violate the due process and equal protection clauses of the Fourteennth Amendment, Article I, Section 8, Clause 3, and Article IV, Section 2 of the Constitution of the United States, and the law as last declared by the Supreme Court of the United States in *Smith* v. *Cahoon,* 283 U. S. 553.

4. The District Court of the United States for the District of Kansas, First Division, erred in not accepting the dissenting opinion of the Honorable Franklin E. Kennamer, District Judge, as declaratory of the law controlling in this case.

5. The District Court of the United States for the District of Kansas, First Division, erred in holding that

Chapter 236 of the Laws of Kansas of 1931, was valid and did not violate Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States.

6. The District Court of the United States for the District of Kansas, First Division, erred in holding that the exemption from the effect of said act of "motor carriers who shall operate wholly within any city or village of this State" in Section 2 of Chapter 236 of the Laws of Kansas, 1931, was not arbitrary, discriminatory and void in violation of Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last declared by the Supreme Court of the United States in *Smith* v. *Cahoon, supra.*

7. The District Court of the United States for the District of Kansas, First Division, erred in holding that the exemption from the effect of said act of private motor carriers "who operate within a radius of 25 miles beyond the corporate limits of such city or any village," in Section 2 of Chapter 236 of the Laws of Kansas of 1931, was not arbitrary, discriminatory and void, and in violation of Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last de-

clared by the Supreme Court of the United States in *Smith* v. *Cahoon, supra.*

8. The District Court of the United States for the District of Kansas, First Division, erred in holding that the exemption from the effect of said act of private motor carriers "in the transportation of live stock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle," was valid and did not violate Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last declared in *Smith* v. *Cahoon, supra.*

9. The District Court of the United States for the District of Kansas, First Division, erred in holding Chapter 236 of the Laws of Kansas, 1931, was valid and not unconstitutional in failing to expressly distinguish the provisions properly applicable to the various carriers classified as private motor carriers of property, and was therefore not void for uncertainty.

10. The District Court of the United States for the District of Kansas, First Division, erred in holding that Section 5 of Chapter 236 of the Laws of Kansas, 1931, was valid and did not violate Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last declared by the Supreme Court of the United States in the case of *Smith* v. *Cahoon, supra.*

11. The District Court of the United States for the District of Kansas, First Division, erred in holding that Section 5 of Chapter 236 of the Laws of Kansas, 1931, did not subject such private motor carriers of property to the same regulations imposed on common carriers, and was not unconstitutional and void, and beyond the power of the State of Kansas, and was not in conflict with the decision of the Supreme Court of the United States in the case of *Smith* v. *Cahoon, supra.*

12. The District Court of the United States for the District of Kansas, First Division, erred in holding that Section 5 of Chapter 236 of the Laws of Kansas, 1931, did not give to the Public Service Commission of the State of Kansas powers in excess of those authorized by the Constitution of the United States, and particularly the Fourteenth Amendment thereto, and in conflict with the decision of the Supreme Court of the United States in the case of *Smith* v. *Cahoon, supra,* with respect to private motor carriers of property, and in holding that the provision of said act making "All laws relating to the powers, duties, authority and jurisdiction of the Public Service Commission over common carriers are hereby made applicable to all such motor carriers, except as herein otherwise specifically provided," did not give to the Public Service Commission the right and authority to require private motor carriers to become subject to the regulations and responsibilities of public carriers, which are beyond the power of the State.

13. The District Court of the United States for the District of Kansas, First Division, erred in holding Sections 8, 15, 16, 17, 19 and 23 of Chapter 236 of the Laws of Kansas of 1931, were valid and did not give to the Public Service Commission of the State of Kansas

powers over private motor carriers of property in excess of those authorized by the Constitution of the United States, and particularly the Fourteenth Amendment thereto, and not in conflict with the decision of the Supreme Court of the United States in the case of *Smith* v. *Cahoon, supra.*

14. The District Court of the United States for the District of Kansas, First Division, erred in holding that the provisions of Chapter 236 of the Laws of Kansas, 1931, exempting the carriers set forth in Section 2 of said act from the provisions of Section 21 of said act requiring a "liability insurance policy in some insurance company or association authorized to transact business in this state, in such reasonable sum as the Commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to pay compensation for injuries to persons and loss of or damage to property resulting from the negligent operation of such carrier," was not arbitrary, discriminatory and void, and not in violation of Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and was not in conflict with the law as last declared by the Supreme Court of the United States in *Smith* v. *Cahoon, supra.*

15. The District Court of the United States for the District of Kansas, First Division, erred in holding that "No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier

by any city or town or other agency of the state," as provided in Section 21 of Chapter 236 of the Laws of Kansas of 1931, was not arbitrary, discriminatory and void, and in violation of Section I of the Fourteenth Amendment to the Constitution of the United States in depriving petitioners of their property without due process of law; in denying petitioners equal protection of the law; in abridging the privileges and immunities of citizens of the United States, and not in conflict with the law as last declared by the Supreme Court of the United States in the case of *Smith* v. *Cahoon, supra.*

16. The District Court of the United States for the District of Kansas, First Division, erred in holding that Section 236 of the Laws of Kansas, 1931, did not subject such private motor carriers of property to the same regulations imposed on common carriers, and was not unconstitutional and void, and beyond the power of the State of Kansas, and was not in conflict with the law as last declared by the Supreme Court of the United States in *Smith* v. *Cahoon, supra.*

17. The District Court of the United States for the District of Kansas, First Division, erred in holding that Chapter 236 of the Laws of Kansas of 1931, did not conflict with and is not repugant to Article I, Section 8, par. 3, of the Constitution of the Unied States delegating to Congress the exclusive power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

V.

SUMMARY OF ARGUMENT.

1.

Appellees' motion to dismiss appellants' bill of complaint admits the truth of all well pleaded facts in the bill of complaint and every reasonable inference in appellants' favor that is deducible from them.

Appellees filed a motion to dismiss appellants' bill of complaint, which motion was in the form and served the purpose of a motion for judgment on the pleadings. Under the rules of pleading in the Federal Courts and in the State Courts of Kansas, such a motion admits the truth of all well pleaded facts in the bill of complaint, and the motion gives the proponents of the bill of complaint every reasonable inference that can be drawn from its allegations in their favor. *Sullivan* v. *Iron Silver Mineral Co.,* 109 U. S., l. c. 555; *Compagnia Italiana Transporto Olii Minerali* v. *Sun Oil Co.,* 29 Fed. (2d) 744; *New York L. Ins. Co.* v. *Bidoggia,* 17 Fed. (2d) 112; *Western Ranches* v. *Custer Co.,* 89 Fed. 577; *Federal Reserve Life Ins. Co.* v. *Gregory,* 132 Kans., l. c. 132; *Gano* v. *Cunningham,* 88 Kans., l. c. 302; *Stewart* v. *Balderston,* 10 Kansas, l. c. 148; 49 C. J. 668, par. 946.

The facts as alleged in the bill of complaint are the facts before this Court for consideration.

2.

The exempting from the provisions of the act of motor carriers who operate wholly within a city or village of the state is unconstitutional and void and violates the Fourteenth Amendment to the Constitution of the United States.

The exemption from the provisions of the act of motor carriers who operate wholly within any city or village of the state, appellants contend is an arbitrary exemption and works a discrimination against appellants.

Appellants contend that this exemption is arbitrary and discriminatory between the motor carriers from plants located outside of the state or the city and village, and motor carriers from plants located inside the city or village. Those outside the city or village are subject to tax while those within the city or village operating in the same place are exempt from tax.

That the exemption is arbitrary and discriminatory in that it exempts from the requirements and rules and regulations of the Public Service Commission motor carriers operating wholly within the city or village while it subjects motor carriers operating from outside the state or the city or village to such rules and regulations while operating in the same city or village.

That the exemption is arbitrary and discriminatory in requiring licenses and insurance on motor carriers operating from outside the state or the city or village while exempting those in the city from said licenses and insurance while operating in the same city or village. *Smith* v. *Cahoon*, 283 U. S. 553; *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32; *Royster-Gucano Co.* v. *Virginia*, 253 U. S., l. c. 415, 40 S. Ct. 560; *Martin* v. *District of Columbia*, 205 U. S., l. c. 139, 27 S. Ct. 440; *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S., l. c. 58, 36 S. Ct

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3.

The exemption from the provisions of the act of private motor carriers who operate within a radius of 25 miles beyond the corporate limits of such city or village is unconstitutional and void and violates the Fourteenth Amendment to the Constitution of the United States.

The exemption from the provisions of the act of private motor carriers who operate within a radius of 25 miles beyond the corporate limits of such city or village is arbitrary and discriminatory and violates the Fourteenth Amendment to the Constitution of the United States.

The act exempts private motor carriers who operate within a radius of 25 miles of such city or any village in the state from the tax, from the rules and regulations of the Public Service Commission, from the requirements of license and insurance.

The result of this provision is that around each city or village of the state is a different sized, different shaped exemption area of 25 miles free from the requirements of the act. Private motor carriers who do not have plants located in this particular city or village are required to pay taxes and are subject to the rules and regulations of the Public Service Commission, must take out a license, must give a bond while operating in this area. Private motor carriers operating from within the city of the radius are free from these requirements. Not only is this provision arbitrary and discriminatory between private motor carriers from within such city or any village and those

from without the state, such city or village, but it also discriminates and gives a wider area of exempted operation to the larger cities over the smaller cities.

In this exempted area beyond the city limits of each city the city has no jurisdiction or control, the roads are not maintained by the city and public safety regulations are not enforced by the city. There is no public safety reason, taxation reason or regulatory reason why this should be exempted area. The area is purely an arbitrary and discriminatory exemption not based upon any reason or distinction and is therefore unconstitutional and void.

(Cases cited under point 2.)

4.

The exemption of private motor carriers in the transportation of live stock and farm products to market by the owner thereof and supplies for his own use in his own motor vehicle is unconstitutional and void.

The exemption from the provisions of the act of private motor carriers in the transportation of live stock and farm products to market by the owner thereof for his own use in his own motor vehicle is not an exemption given to the tillers of the soil, based on the theory that they are producers and the article is a production. This provision exempts the transportation of live stock and farm products to market by the owner thereof, which shows that the carriers exempted need not be the producer, the owner may not be the stock raiser, not be the farmer who planted and raised the farm product.

"Supplies for his own use in his own motor vehicle" does not restrict this to the farmer but includes every private motor carrier of property who goes out to the

farm and elsewhere from the city and transports to his place of business supplies for his own use.

This exemption is arbitrary and discriminatory in that it exempts from the provisions of the act and the requirements of the act any private motor carrier of property who complies with the three requisites of this exemption, that is: that the products carried are live stock, farm products, or supplies for his use; that they are owned by the carrier; and that they are transported in his own motor vehicle.

(Cases cited under point 2.)

5.

The exemption of private motor carriers operating in the transportation of children to and from school is unconstitutional and violates the Fourteenth Amendment to the Constitution of the United States.

The exemption of private motor carriers operating in the transportation of children to and from school is discriminatory and arbitrary in that it frees from the public safety provisions of the act and the regulatory provisions of the act, carriers who should be subject to the utmost regulations and the highest safety provisions.

(Cases cited under point 2.)

6.

Section 2 of said act in conjunction with the other sections of the act is unconstitutional in that it fails to define with a sufficient degree of certainty the obligation the state imposes upon appellants.

The act by its own terms fails to expressly distinguish the provisions properly applicable to the various classifi-

cations of carriers, and also fails to expressly distinguish the exemptions properly applicable to the various carriers classified as private motor carriers of property, and is therefore void for uncertainty. The act places the burden of interpretation on the appellants at the peril of criminal prosecution. *Smith* v. *Cahoon,* 283 U. S. 553.

7.

Sections 5, 8, 16, 17, 19, 22 and 23 of said act give to the Public Service Commission powers far in excess of those authorized by the Constitution of the United States and the laws of the United States with respect to private motor carriers of property.

The act requires private motor carriers of property to obtain a license from the Public Service Commission as a condition precedent to the right to use the highways of the state, and subjects such private motor carriers of property to regulations which can only be imposed on common carriers, which requirements are beyond the power of the state, and unconstitutional. *Smith* v. *Cahoon,* 283 U. S. 553; *Producers Transport Company* v. *Railway Commission,* 251 U. S. 228; *Michigan Public Utility Commission* v. *Duke,* 266 U. S. 570; *Frost* v. *Railway Commission of California,* 271 U. S. 583.

8.

Section 21 of said act in conjunction with Section 2 of said act is unconstitutional and void and violates the Fourteenth Amendment to the Constitution of the United States.

Section 21 of the act requires as a condition precedent to the issuance of a license to the appellants that the appellants shall furnish "a liability insurance policy in

some insurance company or association authorized to transact business in this state, in such reasonable sum as the Commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to pay compensation for injuries to person and loss of or damage to property resulting from the negligent operation of such carriers," but exempts from such requirement motor carriers who shall operate wholly within any city or village of the state, "private motor carriers who operate within a radius of 25 miles beyond the corporate limits of such city, or any village; nor to the transportation of livestock or farm products to market by the owner thereof, or supplies for his own use in his own motor vehicle; or to the transportation of children to and from school."

Section 21 further provides: "No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency of the state." Appellants contend that the above provisions of the act being arbitrary and discriminatory between private carriers themselves makes the act unconstitutional and void. *Smith* v. *Cahoon*, 283 U. S. 553.

VI.

ARGUMENT.

1.

Appellees' motion to dismiss appellants' bill of complaint admits the truth of all well pleaded facts in the bill of complaint and every reasonable inference in appellants' favor that is deducible from them.

Appellees' motion to dismiss is of the form and serves the purpose of a motion for judgment on the pleadings, and is in the nature of a demurrer attacking the cause of action pleaded in the bill of complaint. Under the rules of pleading in the federal courts and the courts of the State of Kansas, such a motion admits the truth of all well pleaded facts in the bill of complaint. The motion is also construed as giving to the proponents of the bill of complaint every reasonable inference that can be drawn from the allegations in the bill in their favor. *Sullivan* v. *Iron Silver Mineral Co.,* 109 U. S., l. c. 555; *Compagnia Italiana Transporto Olii Minerali* v. *Sun Oil Co.,* 29 Fed. (2d) 744; *New York L. Ins. Co.* v. *Bidoggia,* 17 Fed. (2d) 112; *Western Ranches* v. *Custer Co.,* 89 Fed. 577; *Federal Reserve Life Ins. Co.* v. *Gregory,* 132 Kans., l. c. 132; *Gano* v. *Cunningham,* 88 Kans., l. c. 302; *Stewart* v. *Balderston,* 10 Kans., l. c. 148; 49 C. J. 668, par. 946.

The motion to dismiss alleged no facts (R. 21-22), so that the allegations of the bill of complaint in this case become the facts before the Court for legal construction. These facts and those facts that are of common or judicial knowledge are the only facts before the Court.

Appellants have been unable to find in the record any allegation that shows: The number, size, power or speed

of appellants' trucks; the safety or menace of these trucks; the usual or unusual wear of appellants' trucks on the highways of Kansas; whether flour mills or packing houses use trucks, and if so, the method of their use; the method, extent or seasonable use of the highways by farmers; that appellants keep books, and that farmers do not; that the bill as originally presented fixed the exemption limit at three miles, and that the 25-mile exemption was the result of a compromise; that there was some support in the Legislature for a flat 50-mile exemption as contained in the North Carolina statute. Anything with respect to the percentage of accidents occasioned by sleepy drivers; whether or not appellants' objection to the law is merely to the payment of the tax.

Appellants attack the constitutionality of Chapter 236 of the Laws of Kansas, 1931, based on certain allegations in their bill of complaint.

Appellees, conceding these to be the facts in the case, filed a motion to dismiss, and asked the Court on these facts to dismiss the bill of complaint.

A statutory three-judge federal court sustained appellees' motion and dismissed appellants' bill of complaint. The facts then before the Court are the facts alleged in the bill of complaint.

2.

The exemption from the provisions of the act of motor carriers who operate wholly within any city or village of the state.

At the outset appellants recognize the principle that a state has broad discretion in classification in the exercise of its power of regulation (*Smith* v. *Cahoon*, 283 U. S., l. c. 566).

This discretion of a state in classification in the exercise of its power of regulation, however, must not contain discriminations which are entirely arbitray. As Chief Justice Hughes says in *Smith* v. *Cahoon, supra,* l. c. 566-7:

> "But the constitutional guarantee of equal protection of the laws is interposed against discriminations that are entirely arbitrary."

In order not to violate Section I of the Fourteenth Amendment to the Constitution of the United States an act of a state must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Smith* v. *Cahoon, supra; Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32; *Royster-Gucano Co.* v. *Virginia,* 253 U. S., l. c. 415, 40 S. Ct. 560; *Martin* v. *District of Columbia,* 205 U. S., l. c. 139, 27 S. Ct. 440; *Gast Realty Co.* v. *Schneider Granite Co.,* 240 U. S., l. c. 58, 36 S. Ct. 254; *Kansas City Southern Ry.* v. *Road Improvement District,* 256 U. S., l. c. 660, 41 S. Ct. 604; *Houck* v. *Little River Drainage District,* 239 U. S., l. c. 262, 36 S. Ct. 60.

The contention of appellants is that the exemption of motor carriers who operate wholly within any city or village of the state violates Section I of the Fourteenth Amendment to the Constitution of the United States in that it discriminates against appellants and other carriers in the following particulars:

1. Motor vehicles that operate wholly within a city or village of the state are exempted from the payment of the tax. Appellants' trucks from plants located out-

side of the state, or not in a city or village of the state, are required to pay the tax while operating within the same city or village in the state.

2. Motor carriers operating wholly within a city or village in the state are exempt from the requirements and rules and regulations of the Public Service Commission. The trucks of appellants from plants located outside of the state or not located in any city or village of the state while operating in the same city or village are subject to such rules and regulations.

3. Motor carriers operating wholly within any city or village in the state are exempt from the requirements of licenses and insurance. Appellants' trucks from plants outside the state, or not located in a city or village in the state, are subject to the provisions with respect to licenses and insurance while operating in the same city or village.

In *Louis* v. *Boynton,* 53 Fed. (2nd), l. c. 473, Judge Phillips disposes of this contention with the statement:

> "Eighty per cent or more of the tax is to be used to create a fund for reconstruction and maintenance of highways. Such fund will be entirely expended outside of the corporate limits of cities and villages. It is obvious, therefore, that motor carriers operating wholly within a city or village will not receive any direct benefit therefrom, and just reason exists for exempting them from the tax."

In the case at bar, Judge McDermott disposes of it as follows, l. c. 352:

> "There can be no serious question as far as the exemption applies to those vehicles operating wholly within any city or village of the state. As to pri-

> vate carriers, this is primarily a taxing statute, and since city streets are neither constructed nor maintained by the state there is no reason why the state should exact a charge for vehicles which do not use the state highways; nor is there as much occasion for the state to enact statutes looking toward their safe operation in localities where such operation may be controlled by city ordinance."

In other words, these opinions of the courts hold this exemption as constitutional because the maintenance of the streets of the cities and villages of the state is left to those cities and villages, and the sum from this tax is for the purpose of maintaining state roads. The court overlooks the fact that its decision requires the non-resident baker to pay this tax, while operating wholly within a city or village of the state, while the local baker pays no such tax.

The court has overlooked the fact that any non-exempted truck may pass through a number of cities and villages, and is forced to pay a tax for the mileage in these cities and villages, which tax does not go for the maintenance of the roads in the cities or villages, and that the only justification under the commerce act on interstate commerce, and the Fourteenth Amendment to the Constitution for such a tax is as compensation for the use of the highways which in this case it is not.

The court overlooks the fact also, that the regulatory and public safety and indemnity features of the act comprises a large part of the act. It is common knowledge that more motor vehicles operate in the cities and villages in the state than operate on the state highways. The exempting from the requirements or regulation of licenses and of insurance of the majority of the motor vehicles, where these regulations are most important, is a dis-

crimination against the motor vehicle and its operator in the region where the requirements for safety, regulation and insurance are less necessary.

Further considering this exemption as well as all of the other exemptions in Section 2 in conjunction with the last sentence of Section 21 of the act which provides:

> "No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency."

This provision of the act is susceptible of only two possible constructions: First, that the law prohibits any other licenses or bonds than those required by the act; or, second, that if one license is taken out or one bond given, no additional license or bond shall be required of that person for that particular truck. In the opinion in this case the court disposes of this contention as follows, l. c. 357:

> "Plaintiffs complain that the last sentence of Section 21 provides that no city shall require any additional bond. It seems to be fair to say that if one bond is given another shall not be required. But plaintiffs are not hurt by this. They can give all the bonds they wish, without let or hindrance."

This would infer that the court construes the act according to the second alternative above.

If the act is construed on the first alternative, that is, to prohibit any other licenses or bonds than those required by the act, then clearly the reasoning given by the court throughout its opinion in the case as to the constitutionality of the act is at fault, and the act itself makes an arbitrary distinction as to licenses and

bonds which are given as a public safety measure between those who operate outside of the city and those that operate in the city, when as a matter of fact it is common knowledge that public safety measures are of a greater necessity in more densely populated districts.

If this provision of the act is construed as the court construes it, then the truck which operates wholly within any city or village in the state is not required to take out a license or give a bond under the act, but is required to take out a bond and license should they be provided by the city or village. Another truck which operates outside of the city limits of the city or village is required to take out a license and give bond under the act, but is exempted from the license or bond required by the city or village. There is no showing whether or not any city or village requires any license or bond, and if so, the fee for the license and the amount of the bond. It may be equal to, greater than or less than the provisions of the act. If greater or less than provisions of the act, then two trucks operating out of the same plant in the same city or village may have different requirements, first, for license and amount of bond, than another truck operating out of the same plant. Or if the city or village has no provision with respect to licenses and bonds, then one truck which operates beyond the city limits must have a license and give bond, and another truck which operates to a greater extent within the city or village gives no license or bond. The basis for this provision of the act is stated by the courts as a public safety measure. Either construction of the act destroys that purpose absolutely and discriminates between the two trucks operating out of the same plant in the same city, as well as plants of different

persons located in the same city, and from the standpoint of the non-resident of the city or village, makes a more apparent discrimination.

The case of *Smith* v. *Cahoon* passes directly on the points involved in these exemptions under Section 2 of the act, where Chief Justice Hughes says in that case, l. c. 567:

> "So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary, and constituted a violation of the appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made.' *Air-Way Electric Appliance Corporation* v. *Day*, 266 U. S. 71, 85, 45 S. Ct. 12, 15, 69 L. Ed. 169; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 563, 564, 22 S. Ct. 431, 46 L. Ed. 679; *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 417, 30 S. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247; *Truax* v. *Corrigan*, 257 U. S. 312, 332, 333, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375; *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 37, 48 S. Ct. 423, 72 L. Ed. 770."

Appellants therefore respectfully contend that the exemption of motor vehicles operating within cities and villages in the state from the provision of the act is in violation of the Fourteenth Amendment to the Constitution of the United States.

3.

The exempting from the provisions of the act private motor carriers who operate within a radius of 25 miles beyond the corporate limits of such city or any village, is unconstitutional and void, and violates the Fourteenth Amendment to the Constitution of the United States.

In addition to exempting all motor vehicles who operate wholly within a village or city of the state, the second clause of the act exempts all private motor carriers of property who operate within a radius of 25 miles beyond the corporate limits of such city or any village.

The facts show that two of appellants have plants in the state; and all have plants outside of the borders of the state of Kansas.

In the Louis case the action was brought by contract carriers, and this issue was not presented to the court, as it applies only to private motor carriers. In the Louis case, however, l. c. 473, the court recognized this distinction and said:

> "There may be just cause for a non-exempted private carrier to object to the exemptions in Section 2, but we see no grounds for objection by a carrier who transports property or passengers for hire."

In the case at bar, Judge Kennamer in his dissenting opinion held this provision of the act unconstitutional.

In the majority opinion in the case at bar the court says, l. c. 355:

> "The 25-mile exemption is probably sustainable on the ground that the trucks exempted are domiciled in and generally use the city streets; indeed they

must use them to get to the city limits; and such trucks are subject to the control of the city authorities in these respects. Again, plaintiffs' trucks are exempted within the zone as are all others like situated."

And further, l. c. 358-9:

"The argument of plaintiffs, particularly as to the twenty-five-mile exemption, is logically strong, although we do not see how it works any real discrimination against them, since all within the zone are treated alike. The real objection of the plaintiffs is to the payment of the tax; but the tax is reasonable in amount, and those who, like plaintiffs, constantly use the highways as an adjunct to their business, ought to pay their share of maintenance. The question of constitutionality of this statute is not free from doubt; but the rule is as settled as it is sound, that in case of doubt the statute should be upheld."

From this it is seen that the court, both in the Louis case and this case are very dubious about the constitutionality of the exemption of a radius of twenty-five miles around cities and villages.

The contention of appellants is that an exemption of one mile, five miles, twenty-five miles or all of that portion of the state of Kansas west of the 6th P. M. is arbitrary, discriminatory and void, and not based on anything having a relation to the purpose for which it was made. (Cases cited under point 2.)

If the reason that the exemption was included in the law was that the roads were built under the benefit district plan, and many of the users had been called upon to pay a large amount for the construction and maintenance of those highways, and that therefore such users

should be relieved of further cost for such use, then the act clearly discriminates between such users and those who are taxed under the act. The basis for the assessment of cost of local improvements is the increased value brought to the property, and under the decisions of the courts such an assessment is constitutional only when benefits that accrue to the property are assessed. This benefit does not include use, and if this theory is correct, then the users have already received the benefit that they paid for, *i. e.*, the increased value of their property, and would receive an additional benefit, the right to use the roads for which they would not have to pay.

If the 25-mile limitation is attempted to be justified on the basis of the cost and expense of administration, this reason does not apply because it does not eliminate a small user should he get over the 25-mile limit, and still permits the extensive user operating within the 25-mile limitation a mileage of many hundred square miles exempted and not subject to the payment of the tax. The small user may make one trip only and that 26 miles in a straight line from the limits of the city or village on which he would pay some fraction of a cent's tax, which is less than the cost of administration, while the daily user may operate many thousand miles within the exempted area without the payment of any tax. Had it been the intention of the legislature to exempt the small user on the basis of the cost of administration, then the only method justified and which would have been fair and reasonable would have been to have exempted so many miles of operation.

Again, taking this exemption, in conjunction with Section 22, which requires liability insurance, and the rules and regulations as set forth in Sections 5, 16, 18,

19, 20, 22 and 23 of the act, this liability insurance and these rules and regulations are cleary public safety measures, and have nothing to do with the cost of administration nor seasonal or incidental use of the highways. The exemption from the requirement of these provisions of motor carriers who operate within a radius of 25 miles beyond the limits of a city or village where these rules are more needed than at a greater distance from the city or village, is a discrimination and unconstitutional for the reasons so ably set forth in the Cahoon case.

The court, in the opinion in this case above quoted, says: "* * * all within the zone are treated alike." In other words, carried to an absurdity, had the act read: All private motor carriers of property who operate west of the 6th P. M. of the state of Kansas are exempt from the provisions of this act, then the same argument would apply; that is, all east of the 6th P. M. are treated alike, and all west of the 6th P. M. are treated alike. Under the construction of this exemption of the act by the court a radius of 25 miles is drawn around the complete limits of every city or village in the state of Kansas, and private motor carriers operated by persons whose home city or selected base is within that radius pay no tax. Should they by chance break over the boundary of this circle, then they pay only for the territory which lies without the 25-mile boundary.

The purpose of this act as stated by the court in this and the Louis cases, is to provide a tax for the use of the highways as additional compensation to the state of Kansas over the present gasoline and other taxes. The cities and villages of the state take care of their own roads and streets. Outside of the cities and villages the state of Kansas must tax everyone uniformly and

not arbitrarily for the use of the highways. To exempt one mile outside of the cities and villages of the state of Kansas, would be discriminatory and unfair, as well as arbitrary. The same can be said of five, ten, fifteen, twenty-five or one hundred miles, all of which would likewise be an arbitrary figure, and therefore void. It is a matter of common knowledge that there is more traffic within the cities and villages and around the limits of the cities and villages than at a greater distance therefrom. It is likewise common knowledge that the more a road is used the sooner it becomes destroyed and needs repairs. If the tax is not to be discriminatory or arbitrary, the vicinity near the cities should be taxed as much as the outlying districts. The test in all of these cases is: "Is the classification based upon anything having relation to the purpose for which it is made?" (Cases cited.)

That this argument is sound is shown by the majority opinion in this case, l. c. 354, where the court says:

> "The records disclose that, when the bill was originally presented, its limit was fixed at three miles, which would take in the outlying trade territory of most of the cities, although there are some that extend beyond that. There was some support for the flat 50 miles exemption contained in the North Carolina statute. The result was the compromise contained in this section."

Certainly then, if the 25-mile exemption is the result of a compromise as to distance, then the classification does not rest upon some ground of difference having a fair and substantial relation to the object of the legislation.

The arbitrary distance of 25 miles has no relation to the purpose for which the law of the state of Kansas was passed.

The opinion of the court in this case says, l. c. 359:

"* * * all within the zone are treated alike."

Does the court mean by that "all within the particular zone within the city"? If not, then within the state of Kansas no two zones located within different cities or villages, or outside of a city or village is treated the same as any other zone. It is a mathematical fact that a 25-mile radius around a large object contains a greater area than a 25-mile radius around a small object. As a hypothetical case, apply the law to a small circular village in the state of Kansas whose distance from the central portion to the city limits is one mile. According to the opinion of the court, a private motor carrier whose home city or base was within this city, would be exempted from the provisions of the act for a radius of 25 miles beyond the city limits, or a total area of approximately 2,123 square miles free from taxation. The area of the village would be 3.1416 square miles. So on this basis the exemption of the private motor carrier located in this village would cover approximately 2,120 square miles.

As opposed to this, consider a circular city whose limits were ten miles from the center of the city. The private motor carrier located in this city, or whose base was there, would have a radius free from the provisions of the act of 35 miles from the center of the city, or a total of approximately 3,848 square miles from taxation. Deducting likewise, the area of this city which would be 314 and a fraction square miles, the private motor

carrier in this city would have an exempted area outside of the city limits of approximately 3,534 square miles as compared with 2,120 square miles of the private motor carrier coming from the smaller village—a difference of approximately 1,414 square miles of exempted territory in favor of the private motor carrier from the larger city outside the boundaries of such city. Applying the act and this exemption to the plants of petitioners, the plant of petitioner located in Hutchinson, Kansas, would have less square miles of area free from the exemptions of the act than the plant of the same company located in Wichita, Kansas. And the plant of appellant located in Topeka, would have a greater exempted area outside the corporate limits of the city of Topeka than the plant of its competitor in Hutchinson, Kansas. The effect of 25 miles exemption in this respect is to discriminate between every city, town and village in the state of Kansas. There is further a discrimination in favor of the larger cities as over the smaller cities and villages of the state.

Further, consider the law with respect to a plant located not within a city or village of the state. Such a plant would have no exemption and no area over which it could operate free from the provisions of the act. Consider the plants of appellants located outside of the borders of the state of Kansas; they have no exemptions unless as suggested by the court in its opinion, they establish a home base in some city or village in the state of Kansas, and are subject to the provisions of the act going to and from this home base. This constitutes a discrimination between the resident and non-resident.

All of the above exemptions have been based upon cities that are circular in form. It is a recognized fact that no city limits of any cities or villages are in a

regular shape. Nor is any city or village uniform or included within a circle. It is a mathematical fact that a 25-mile exemption around an irregular object is either larger or smaller than the 25-mile limit around a circular object of the same area. A 25-mile radius around a square, rectangle, or any polygon, is a different area even though the area of the square, rectangle or polygon be the same. It is also a mathematical certainty that a 25-mile radius around an irregular body, particularly if the area of the irregular body extends up into points, is much greater than the same 25 miles radius around a circle.

The Kansas law with respect to treating all alike discriminates as to exemptions in every city or village of the state, favoring the larger city over the smaller city, and favoring the irregular shaped city over those cities whose boundaries are regular.

The opinion of the court meets this point by referring to the case of *Chicago, R. I. & P. Railway Co.* v. *United States,* 52 S. Ct. 87, 91, which was a case based upon the propriety of classification predicated upon difficulty of administration and accounting. Appellants fail to see the applicability of this case to this point.

The court cites the case of *Clark* v. *Maxwell,* 197 N. Car. 604, which was affirmed without opinion in 282 U. S. 811. In that case the laws of North Carolina, 1929, Chapter 346, Section 167, Sub-Section 3, provide for license taxes, and then provides:

> "Every person * * * engaged in the business of operating automobiles * * * for the transportation of property over the public highways of this state for compensation between termini for a distance greater than fifty miles * * *."

This is not an analogous point; this is a specific exemption based upon distance traveled. As the court says in conclusion in distinguishing this from other similar cases to the case at bar:

> "In this case the classification, for purposes of taxation, is reasonable, and there is no exemption. There is, therefore, no unjust discrimination."

The case of *Carley & Hamilton* v. *Snook,* 281 U. S. 66, was a case based upon the California act (Motor Vehicle Act of California, 1923, California Statutes [c] 266, as amended, 1927, California Statutes [c] 884). The Act is based upon the weight of the trucks and has nothing to do with 25 mile or other limits. Likewise each of the other cases cited by the court can be distinguished from the case at bar as based on the classification basis of taxation and not discriminatory. The question of taxation alone seems to be involved, while in the case at bar, not only taxation but the question of regulations, licenses and bond, and the public safety, is a large part of the act.

The court relies in its opinion on the case of *State ex rel* v. *Kozer,* 116 Oregon 581, the only case appellants can see that bears on the issues in this case. In that case the Supreme Court of the State of Oregon bases its decision on this reasoning:

> "But, say petitioners, 'why make it a five mile limit? Why not ten, twenty or thirty miles?' With like propriety we might ask: 'Why did the Legislature require a certain license fee for an automobile having a weight of 2,000 pounds? Why not fix the fee on a basis of 3,000 pounds? Such matters rest within the discrimination of the Legislature, and are not subject to review when their purpose is in keeping with the general legislation of the state in build-

ing and maintaining roads. If it is reasonable to require a greater fee for the operation of heavier automobiles because of damages sustained by the roads, it is likewise just and equitable to exact higher fees of owners who are given the right and privilege of operating their motor vehicles over a greater extent of highways. This law makes no distinction among those of the same class. It treats all alike who are similarly situated, and thereby meets the constitutional requirement that all citizens must be given equal protection of the laws."

And cites as supporting this doctrine the case of *Keeney* v. *N. Y.*, which was decided in the Supreme Court of the United States on January 9th, 1912, in which "a graduated tax was imposed by the New York Statute of 1896 upon the transfer of property, real or personal * * * or of any interest therein or income therefrom in trust or otherwise." Mr. Justice Lamar rendered the opinion in that case.

There is nothing in *Kenney* v. *New York* that has anything to do or the remotest connection with the exemption of five miles or any other area.

The case of *State* v. *Kozer* did not go to the Supreme Court of the United States. The reasoning of the court indicates that the court considered constitutional a 5-mile exemption, a 10-mile exemption, a 20-mile exemption, a 30-mile exemption and so on to the exemption cited to this Court based on the 6th Principal Meridian.

The reasoning of the court based upon the different wear and tear to the roads of a heavier over a smaller truck the court did not consider. Nor did it discuss the discrimination that arbitrary, discriminatory, unequal exemptions such as a 5-mile limit or multiples or fractions thereof would make. If this portion of the Oregon case is the law, then the Fourteenth Amendment to the Con-

stitution of the United States, and the hundreds of decisions thereon with respect to arbitrary and discriminatory acts, are nullified.

The decision in the case of *State* v. *Kozer* is against appellants' contention, and contrary, as appellants contend, to the ruling of this Court in construing Section I of the Fourteenth Amendment to the Constitution of the United States. In the opinion in this case the Court says, l. c. 355:

> "Of course, twenty-five miles is further than five miles; and it does seem that a twenty-five mile exemption, even for facility of administration, is pretty far. But if the state has the power to create this penumbra about the city, the question of the distance must be left to the legislature unless it is clearly arbitrary."

Lastly, taking the exemption of 25 miles beyond the city limits of the city or village in connection with the last sentence of Section 21 of the Act, which is discussed under Point II of this brief, and which exempts carriers operating in this territory from the obligation of licenses and bonds, it is certainly true that the reason given by the court for considering this exemption, that is, that the city or village itself would require bonds and licenses, does not apply in this instance, as no city or village has any jurisdiction outside the limits of that city or village. The extension of the exemption of 25 miles beyond the city limits might result in a truck giving a city license and bond as protection to the public safety within the city or village, and then have this territory outside of the city limits for 25 miles in which they give no license or bond either under this act or as required by the city. Every other truck operating from outside of the state from any other city or village in the state into this 25-mile radius around the

city which is exempted would be required to take out this license and give this bond. One of the principal contentions of appellants with respect to this 25-mile exemption is with respect to the public safety provisions thereof. In the case of *Smith* v. *Cahoon, supra,* l. c. 566, 567, Chief Justice Hughes says:

> "But the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary. In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the state's action. In the present instance, the regulation as to the giving of a bond or insurance policy to protect the public generally, in order to be sustained, must be deemed to relate to the public safety. This is a matter of grave concern as the highways become increasingly crowded with motor vehicles, and we entertain no doubt of the power of the state to insist upon suitable protection for the public against injuries through the operations on its highways of carriers for hire, whether they are common carriers or private carriers. But, in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary, and constituted a violation of the appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made.'"

And this is the basis of the dissenting opinion of Judge Kennamer in the case at bar, where he says, l. c. 359:

> "I concur in the opinion of the majority in so far as the same construes the Kansas Highway Act that the statute has as its purposes the regulation of the highways and taxation.
>
> I dissent from the views expressed by the majority sustaining the constitutionality of the act. The exemption of motor carriers who operate within radius of 25 miles beyond corporate limits of any village or city is an unreasonable discrimination in favor of such operators. The necessity for the protection of the public on the highways within radius of 25 miles is just as great or greater as beyond such radius, as the probabilities of damage to persons or property would be more likely than beyond such radius. The case of *Smith* v. *Cahoon*, 283 U. S. 553, 51 S. Ct. 582, 75 L. Ed. 1264, seems to me to be controlling."

Appellants respectfully contend that the exemption from the provisions of the act of private motor carriers who operate within a radius of 25 miles beyond the corporate limits of a city or village is unconstitutional and void, is arbitrary and discriminatory, and in violation of Section I of the Fourteenth Amendment to the Constitution of the United States.

4.

The exemption from the provisions of the act of the transporation of live stock and farm products to market by the owner thereof, or supplies for his own use in his own motor vehicle, is unconstitutional and void, and violates the Fourteenth Amendment to the Constitution of the United States.

The Court says in the opinion in this case on this point, l. c. 353:

> "We think the legislature had a right to take into consideration the fact that as business is now conducted the transportation of live stock and farm products to market by the owners occasions but a casual and infrequent use of the highways, while the transportation of the finished product to the ultimate consumer is accomplished generally by the sellers, and that their use of such highways is habitual and constant."

Appellants contend that not only is this exemption void, but that in its opinion the court in this case has not considered the full import of this exemption of the act. Not only does the act exempt the farmer or the producer, but includes any owner of live stock and farm products being transported to market. The three essentials are: That the products must be live stock and farm products, that they must be owned by the carrier, and transported in his own motor vehicle. This permits any person who owns live stock or farm products to transport them to market free of the tax. The live stock commission merchant can go out and buy live stock and haul it to market free of tax; the elevator owner, the miller, the manufacturer of food products can got out and buy farm products, such as wheat, corn or oats, and trans-

port them to the mill or market and be exempt from the tax.

The theory on which all exemptions urged give to the tillers of the soil is that they are producers and that the article is a production. It is based upon the theory that the individual who produces such products, being a tiller of the soil, should have the right to bring such products to market and there dispose of them. This exemption in Section 2 of the act does not restrict it to the producer, but makes it possible for the commission merchant, the middleman, or the individual buyer of such products to purchase at the farm, or any other place, and distribute such products to market exempt from the tax.

For this reason the seasonal, incidental, casual and occasional use set forth in the opinion of the court as the underlying principle involved in this exemption does not justify it. This argument also presumes that the use of petitioners is daily and regular, and a distinction exists between the two.

With respect to this argument, as also with respect to the 25-mile limitation discussed under Point 3 of this brief, there are numerous users of the roads who are not engaged in the distribution of their own live stock or farm products whose use of the roads is merely incidental, casual and seasonal. The implement man who delivers his own implements to the farmer that are sold on conditional sales contract or that are taken to the farms for the purpose of demonstration; the filling station man who delivers his gasoline to the farm; the merchant of the city delivering furniture and household goods, and many others too numerous to set forth.

Attention also should be called to the fact that there are farmers who bring and deliver products to the town

daily, and over regular routes, and that such farmers use the highways. The farmer who daily brings his milk, chickens, eggs and garden products to his regular customers in the city is an example of this.

The act exempts "transportation of live stock and farm products to market by the owner thereof," which shows clearly that the carrier exempted need not be the producer of these exemptions. The owner may not be the stock raiser who bred and raised the stock, nor the farmer who planted and raised the farm products. And then continuing the quotation further: "Or supplies for his own use in his own motor vehicle." Does this mean that the owner can transport his own supplies, and if not, under what interpretation of the act can this be restricted to the farmer, and can the farmer only be allowed to transport his supplies, as is inferred from the court's opinion? If the act is interpreted as it reads, it is not restricted to the farmer, and the farmer only cannot be allowed to transport his supplies. If not restricted to the farmer, it means that every private motor carrier of property can go out to the farm, or elsewhere in the state, and transport to his place of business supplies for his own use; that any private motor carrier of property who complies with the three requisites of this exemption, is exempt from the act; that is, that the products carried are live stock or farm products; that they are owned by the carrier; and that they are transported in his own motor vehicle.

The Supreme Court of four states passed upon the constitutionality of this exemption in different forms: The State of Georgia in the *Southern Transfer Company* v. *Harris,* 171 Ga. 358; the State of Oregon in *State* v. *Kozer,* 116 Ore. 581; the State of Minnesota in *State*

v. *LeFebvre,* 174 Minn. 248, and the State of Florida in *Smith* v. *Cahoon,* 99 Fla. 1174.

The Minnesota case seems to be the leading authority in the state courts, and the basis of all the state court decisions on this point.

In the Georgia case, it is cited as the only authority, except a Georgia case based on a local city ordinance. In the Oregon case, no authorities are cited, and in *Smith* v. *Cahoon,* 99 Fla., l. c. 1182, the Minnesota case is cited as the only authority on this point. *Smith* v. *Cahoon* was appealed to this court, and this court overruled the position of the Florida court, and therefore the position of the Minnesota court on which it was based, and of the Georgia court likewise.

From a public safety standpoint as decided in the case of *Smith* v. *Cahoon* and discussed under Point 3 of this argument there is no reason why the transporters of live stock, farm products and supplies should be exempted from the provisions of the act. As a matter of fact, the danger to the general public from the transportation of these products and articles is as great a menace to the public safety as the transportation of any other products and articles and there is just as much need for regulations, licenses and insurance to protect and indemnify the public. The exemption of these products and materials from the effect of the act is arbitrary and discriminatory.

Appellants respectfully contend for the reasons herein given, and the reason stated under Points 2 and 3 of this brief, that the exemption of private motor carriers in the transportation of live stock and farm products by the owner thereof, and supplies for his own use in his own motor vehicle, is unconstitutional, discriminatory

and void, and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

5.

The exemption from the provisions of the act of motor carriers operating in the transportation of children to and from school is unconstitutional and void, and violates Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This exemption was held constitutional by the court in this case, and in *Louis* v. *Boynton,* l. c. 473. In this case the following reasons are given, l. c. 352:

> "Nor can there be any serious question about the exemption as to the transportation of children to and from schools. This public agency can be fairly exempted from taxation for the same reason that municipal bonds are; the question of the safe operation of such vehicles can be properly left to the school authorities, who are directly responsible therefor."

The court, however, in passing upon this exemption has considered it only from the standpoint of a revenue measure, and it has overlooked the public safety provision which in the case of children is even more important than that of adults. Why in the transportation of children should the act exempt the driver of their vehicle from the regulatory measures of the act. If, as the court says in its opinion, the reason for the act is to prevent sleepy and drunken drivers, then why should the drivers of children to and from school be allowed to be sleepy and drunken, when the drivers of trucks conveying oil, bread and other products must be sober and in full

possession of their senses? What is the reason for the exemption of the driver of children to and from school from the requisites of obtaining a license, giving a bond and being subject to the regulations of the Public Service Commission, when the driver of a different kind of a truck must obtain such license, give a bond, and be subject to these regulations. As a public policy measure and as a public safety measure, reason and logic require a more stringent method of handling immature and inexperienced children than grown adults. If the basis of this exemption is not to be arbitrary and discriminatory, but based upon something real, then public policy and public safety demand greater protection for children than for material products.

Appellants respectfully contend that this exemption is arbitrary and not based upon any reason, and violates Section 1 of the Fourteenth Amendment to the Constitution of the United States.

6.

Either Sections 2, 17, 19, 23 and 24 of the act, taken in conjunction with the entire act, impose upon the appellants obligations to which the state had no constitutional authority to subject them, or they failed to define such obligations with a fair degree of certainty, which is required of criminal statutes.

Section 2 of the act provides for the four exemptions from the provisions of the act as enumerated in paragraphs 2 to 5 of this brief.

Section 17 of the act imposes upon appellants a penalty equal to one-half of one per cent per month of the original fee, makes these a lien upon the personal property of appellants and vehicles of all persons leased by peti-

tioners in their business and provides that property and vehicles may be held under warrant issued by the Commission and sold in accordance with the law applicable to personal property taxes, and that the delinquency shall be the ground for the issuance of a writ of attachment against appellants.

Section 19 of the act provides that a failure to comply with the provisions of said act or the denial to the Commission of access to the books of record shall make appellants guilty of a misdemeanor.

Section 23 of the act provides if appellants violate any provisions of the act, or fail to observe any order, decision or regulation of the Commission, they shall be guilty of a misdemeanor and subject to arrest and prosecution.

Section 24 of the act gives to the county attorney of the State of Kansas the power to prosecute all violations of the act.

Appellants contend that the act as written is so confusing and ambiguous that it is impossible for appellants to properly construe the act, and under the act upon them is placed the burden of properly construing it or being subject to fines and imprisonment. Under the provisions of the act it is impossible for appellants to determine whether they are free from taxation only in the city or village in which their plant is located, or in any city or village in which they operate. Or whether the act means that private motor carriers are exempt from the tax at all times while operating within any city or village in the state.

Under the 25-mile exemption whether a radius of 25 miles beyond the corporate limits of any such city or village is absolutely free from taxation, or becomes a taxable radius when the motor vehicle goes to some point

beyond the 25-mile radius, and then whether or not the entire mileage only outside of the 25-mile radius is taxable, or the entire mileage then covered by the motor vehicle on its entire trip.

With respect to the plants of appellants located outside of the State of Kansas, the act does not provide whether or not said vehicles are taxable on entering the State of Kansas; and if not, whether or not they are entitled to a 25-mile exemption, and if they are entitled to 25 miles exemption, whether it is from a uniform point of entry into the State of Kansas; the nearest point of entry into the State of Kansas; or any point of entry into the State of Kansas.

As Chief Justice Hughes says in the Cahoon case, l. c. 564:

> "Either the statute imposed upon the appellant obligations to which the state had no constitutional authority to subject him, or it failed to define such obligations as the state had the right to impose with the fair degree of certainty which is required of criminal statutes. Considered as severable, the statute prescribed for private carriers 'no standard of conduct that it is possible to know.' *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 221, 34 S. Ct. 853, 58 L. Ed. 1284; *Collins* v. *Kentucky,* 234 U. S. 634, 638, 34 S. Ct. 924, 58 L. Ed. 1510; *United States* v. *L. Cohen Grocery Co.,* 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045; *Weeds, Inc.,* v. *United States,* 255 U. S. 109, 41 S. Ct. 306, 65 L. Ed. 537; *Connally* v. *General Construction Co.,* 269 U. S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322. * * * The Legislature could not thus impose upon laymen, at the peril of criminal prosecution, the duty of severing the statutory provisions

and of thus resolving important constitutional questions with respect to the scope of a field of regulation as to which even courts are not yet in accord."

Again, the act provides for the same tax on a motor truck which travels to a fixed point in the State of Kansas without a load and returns without a load as is charged to a similar truck traveling over the roads of Kansas loaded with a capacity load and returning with no load, or a similar truck to the same point in the State of Kansas with a capacity load, and returning with a capacity load.

As this court says in *Connally* v. *General Construction Company*, 269 U. S. 385:

> "The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

The court further states, on page 329, as follows:

> "The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course

it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

Should appellants fail to correctly construe any of the above provisions of the act, they are subject to arrest and prosecution.

Appellants therefore respectfully contend that Chapter 236 of the Laws of Kansas of 1931 is indefinite, discriminatory, and fails to define the obligations imposed upon the appellants with a fair degree of certainty that is required of criminal statutes.

7.

Sections 5, 8, 16, 17, 19, 22 and 23 in conjunction with the other provisions of the act give to the Public Service Commission of the State of Kansas powers far in excess of those authorized by the Constitution of the United States and the laws thereof with respect to private motor carriers of property.

Section 8 of the act requires private motor carriers of property to obtain a license. Section 16 of the act empowers the Commission to inspect the books and documents of private motor carriers of property. Section 17 of the act in addition to requiring the payment of fees, with a penalty, and authorizing the issuing of a warrant, gives the Commission the right to revoke the license for failure to comply with the provisions of the section. Section 19 of the act provides that those who deny the Commission access to books or records shall

be guilty of a misdemeanor. Section 22 of the act gives the Commission the right to publish such regulations as it may deem necessary to properly carry out the provisions of the act, and provides certain rules which shall be promulgated by the Commission regarding the condition of the vehicle, the qualifications and condition of the operator, the hours of service for the operator, and the method of report of accidents, the requirement that each carrier shall have attached to each unit or vehicle such distinctive marking as shall be adopted by the Commission. Section 23 of the act makes anyone who violates any provision of the act, or fails to observe any order, decision or regulation of the Commission guilty of a misdemeanor and provides a fine therefor.

In addition to this, Section 5 of the act provides:

> "The Public Service Commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers in this state and to fix and approve reasonable maximum or minimum or maximum and minimum rates, fares, charges, classifications and rules and regulations pertaining thereto. And the Public Service Commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers, contract motor carrier of property or of passengers and private motor carrier of property in the state and to regulate and supervise the accounts, schedules, service and method of operation of same; to prescribe a uniform system and classification of accounts to be used; to require the filing of annual and other reports and any other data; and to supervise and regulate 'public motor carriers of property or of passengers,' 'contract mo-

tor carriers of property or of passengers' and 'private motor carriers of property,' in all matters affecting the relationship between such *'public motor carriers of property or of passengers,' 'contract motor carriers of property or of passengers'* and *'private motor carriers of property'* and the traveling and shipping public. The Public Service Commission shall have power and authority by general order or otherwise to prescribe reasonable and necessary rules and regulations governing *all such motor carriers*. All laws relating to the powers, duties, authority and jurisdiction of the Public Service Commission over common carriers are hereby made applicable to *all such motor carriers* except as herein otherwise specifically provided" (italics ours).

In the opinion in this case the court construes Section 5 of this act, and particularly the last sentence thereof, to apply only to common carriers.

On the matter of the construction of "all such motor carriers," in the next to the last line of Section 5, the rule of construction is that the word "such" is a pronoun adjective and that the antecedent should agree in person, gender and number. This is a universal rule and we find it in Jesse L. Wheeler's Grammar at Work, new edition; Professor D. V. Marti's English and Use, and Goold Brown's The Grammar of English Grammars. This latter work is used by the lexicographer of the Literary Digest, and is the most quoted and used grammar. The pronoun adjective, "such," agrees with the antecedent "public motor carriers of property or of passengers, contract motor carriers of property or passengers, and private motor carriers of property." In all three respects, the word "motor" is a descriptive adjective and makes positive the particular antecedent re-

ferred to because the various motor carriers, which we contend is the antecedent, are described as motor carriers; then, too, in the preceding sentence, is the same phrase, "all such motor carriers," which without a doubt refers back to the group of carriers, and which unquestionably is the antecedent. Also common carriers, as used in the last clause is a part of the subject of the sentence, and cannot be an antecedent, also if common carriers should be the antecedent, there would be no sense to the provision or the sentence, also the phrase being motor carriers, cannot refer to common carriers because common carriers include all classes of carriers, whether they are motor, steam, rail, steamship, telephone, telegraph, pipe line, or any other class of common carriers. It seems to appellants that the descriptive adjective, "motor," settled the issue.

Appellants have read these provisions of the act and interpreted them according to the English therein with respect to private motor carriers of property. The question is: Does this Act and these provisions give to the Public Service Commission powers over private carriers which are not authorized under the Federal Constitution and amendments. Certainly the wording of the Act gives to the Public Service Commission jurisdiction and provides that all laws relating to the powers, duties, authority and jurisdiction of the Public Service Commission over common carriers are hereby made applicable to all motor carriers except as herein specifically provided.

In the *Cahoon* case, Chief Justice Hughes says, l. c. 563:

> "It is true that the statute does not in express terms demand that a private carrier shall constitute itself a common carrier, but the statute purports to subject all the carriers which are within the terms

of its definition to the same obligations. Such a scheme of regulation of the business of a private carrier, such as the appellant, is manifestly beyond the power of the State."

And before that Chief Justice Hughes says, l. c. 563:

"All carriers within the Act, whether public or private, are put by the terms of the statute upon precisely the same footing. * * *"

It is the contention of appellants that these provisions of the act give to the Public Service Commission powers, rights and responsibilities over private motor carriers of property in excess of those as authorized by law over private motor carriers of property, and equal to, if not exceeding, the powers which they have over common carriers of property. The legislature may not by its declaration make a private motor carrier of property a common carrier and so compel it to devote its property to public use. To do so constitutes a taking of private property for public use without compensation, and violates the Fourteenth Amendment to the Constitution of the United States. *Producers Transport Co.* v. *Railway Commission,* 251 U. S. 228; *Michigan Pub. Utility Com.* v. *Duke,* 266 U. S. 570; *Frost et al.* v. *Railroad Com.,* 271 U. S. 583.

8.

Section 21 of the act taken in conjunction with Section 2 of the act is unconstitutional and void, as discriminatory and arbitrary.

Section 21 of the act requires private motor carriers of property to take out and have approved by the Public Service Commission a liability insurance policy in such reasonable sum as the commission may deem necessary

to adequately protect the interests of the public, and provides that no other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency of this state. This provision of the act has been discussed fully under Points 2, 3 and 4 of appellants' argument, where it is taken up in connection with the exemption from the provisions of the act of the specifically exempted motor carriers, or motor carriers of property. This provision of the act in addition to being arbitrary, discriminatory and void because of the exemptions above enumerated, likewise extends the power of the state in the regulation of private motor carriers of property. It is only necessary to quote from Chief Justice Hughes's opinion in *Smith* v. *Cahoon,* l. c. 565, where he says:

> "Among the provisions of the statute binding upon those who apply for and obtain certificates of public convenience and necessity is one that a bond or insurance policy, approved by the state commission, shall be furnished in order to afford security for the public against injuries as well as for the protection of persons and property transported. If we leave on one side the requirement that a certificate holder, who is a private carrier, shall give a bond or policy for the goods carried by him, irrespective of his contract with his employer whose goods he carries, and if we consider only the provision for the protection of the public with respect to the use of the highways, another constitutional difficulty is encountered, that is, of an unconstitutional discrimination. If the provisions of the act were treated as severable, and requirements relating to the safety of the public are separately considered, we are brought to the terms of the act with respect to those who are required to obtain certificates of public convenience and necessity and thus to supply the stipulated security. The act provides that the

> term 'auto transportation company,' upon which the obligations of the act are imposed, shall not include 'any transportation company engaged exclusively in the transporting of agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point en route to primary market, or to motor vehicles used exclusively in transporting or delivering dairy products.' The point with respect to this discrimination is not that a distinction is made between common carriers and private carriers, but between private carriers themselves, although they are alike engaged in transporting property for compensation over public highways between fixed termini or over a regular route."

Appellants therefore respectfully urge that Chapter 236, and particularly Section 21 thereof, taken in conjunction with Section 2 of the act, is unconstitutional and void, and denies to appellants equal protection of the law as guaranteed by Article 4, Section 2, of the Constitution of the United States, and Section I of the Fourteenth Amendment to the Constitution of the United States.

VII.

Conclusion.

For the reasons hereinbefore set forth, appellants respectfully urge that Chapter 236 of the Laws of Kansas, 1931, is unconstitutional and void, and respectfully pray that this court reverse the decision of the majority of the statutory three-judge court.

CHARLES R. WILKE,
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Counsel for Appellants.

APPENDIX "A."

CHAPTER 236, LAWS OF 1931.

RELATING TO MOTOR CARRIERS AND TO TRANSPORTATION THEREON OVER THE PUBLIC HIGHWAYS.

Senate Bill No. 387.

An Act relating to transportation by motor vehicles over the public highways of Kansas, and repealing all parts of Chapter 206 of the Laws of 1925 and Chapter 222 of the Laws of 1929 (being Sections 66-196 to 66-1,107, inclusive, of the 1930 Supplement to the Revised Statutes of Kansas, 1923), inconsistent or in conflict with this act.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. (*a*) The term "motor vehicle" when used in this act means any automobile, automobile truck, trailer, motor bus or any other self-propelled or motor-driven vehicle used upon any public highway of this state for the purpose of transporting persons or property. (*b*) The term "public motor-carrier of property" when used in this act shall mean any person engaged in the transportation by motor vehicle of property for hire as a common carrier having a fixed termini or route. (*c*) The term "contract motor carrier of property" when used in this act shall be construed to mean any person not a public motor carrier of property engaged in the transportation by motor vehicle of property for hire as a business. (*d*) The term "private motor carrier of property" when used in this act shall be construed to mean any person engaged in the transportation by motor vehicle of property sold

or to be sold by him in furtherance of any private commercial enterprise. (*e*) The term "public motor carrier of passengers" when used in this act shall mean any person engaged in the transportation by motor vehicle of passengers or express for hire as a common carrier having a fixed termini or route. (*f*) The term "contract motor carrier of passengers" when used in this act shall be construed to mean any person not a public motor carrier of passengers engaged in the transportation by motor vehicle of passengers or express for hire. (*g*) The term "public highway" when used in this act shall mean every public street, road or highway or thoroughfare of any kind used by the public.

SEC. 2. That this act shall not apply to motor carriers who shall operate wholly within any city or village of this state, or private motor carriers who operate within a radius of twenty-five miles beyond the corporate limits of such city, or any village, nor to the transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle; or to the transportation of children to and from school.

SEC. 3. All "public motor carriers of property or passengers" as defined in this act are hereby declared to be common carriers within the meaning of the public utility laws of this state, and are hereby declared to be affected with a public interest and subject to this act and to the laws of this state, including the regulation of all rates and charges now in force or that hereafter may be enacted, pertaining to public utilities and common carriers as far as applicable, and not in conflict herewith.

SEC. 4. No public motor carrier of property or passengers, contract motor carrier of property or passengers or private motor carrier of property shall operate any

motor vehicle for the transportation of either persons or property for compensation on any public highway in this state except in accordance with the provisions of this act.

SEC. 5. The public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers in this state and to fix and approve reasonable maximum or minimum or maximum and minimum rates, fares, charges, classifications and rules and regulations pertaining thereto. And the public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers, contract motor carrier of property or of passengers and private motor carrier of property in the state and to regulate and supervise the accounts, schedules, service and method of operation of same; to prescribe a uniform system and classification of accounts to be used; to require the filing of annual and other reports and any other data; and to supervise and regulate "public motor carriers of property or of passengers," "contract motor carriers of property or of passengers" and "private motor carriers of property," in all matters affecting the relationship between such "public motor carriers of property or of passengers," "contract motor carriers of property or of passengers" and "private motor carriers of property" and the traveling and shipping public. The public service commission shall have power and authority by general order or otherwise to prescribe reasonable and necessary rules and regulations governing all such motor carriers. All laws relating to the powers, duties, authority and jurisdiction of the public service commission over common carriers are hereby

made applicable to all such motor carriers except as herein otherwise specifically provided.

SEC. 6. All transportation charges made by any public motor carrier shall be just and reasonable.

SEC. 7. It shall be unlawful for any public motor carrier to operate as a carrier of intrastate commerce within this state without first having obtained from the public service commission a certificate of convenience and necessity. The public service commission, upon the filing of application for such certificate, shall fix a time and place for hearing thereon, which shall not be less than twenty nor more than thirty days after such filing. The public service commission shall cause a copy of such application and notice of hearing thereon to be served at least ten days before the hearing upon an officer or owner of every common carrier that is operating or has applied for a certificate to operate in the territory proposed to be served by the applicant, and on the city clerk of every city into or through which said motor carrier may desire to operate; and any such common carrier or city is hereby declared to be an interested party to said proceedings and may offer testimony for or against the granting of such certificate, and any other interested person may offer testimony at such hearing. If the commission finds from the evidence that the proposed service or any part thereof will promote the public convenience and necessity, the commission shall issue the certificate; otherwise such certificate shall be denied. Before granting a certificate to a public motor carrier, the commission shall take into consideration other existing transportation facilities in the territory for which a certificate is sought, and in case it appears from the evidence that the service furnished by existing transportation facilities is reasonably adequate, the commission shall not grant such certificate.

SEC. 8. It shall be unlawful for any "contract motor carrier of property or passengers" or "private motor carrier of property" to operate as a carrier of property or passengers within this state either in intrastate commerce or in interstate commerce without first having obtained from the public service commission a license therefor. An application shall be made to the public service commission in writing stating the ownership, financial condition, equipment to be used and physical property of the applicant, and such other information as the commission may request. Upon receipt of such information and on compliance with the regulations and payment of fees, the public service commission shall issue a license to such applicant.

SEC. 9. It shall be unlawful for any public motor carrier to operate as a common carrier of interstate commerce within this state without first having furnished the public service commission in writing full information concerning: (*a*) The ownership, financial condition, equipment to be used and physical property of the applicant; (*b*) the complete route over which the applicant desires to operate; (*c*) the proposed rates, schedule or schedules and/or time cards of the carrier; (*d*) such other information as the commission may request covering observance of state police regulations and payment of fees. Upon receipt of such information and payment of fees the commission shall issue such interstate carrier a license.

SEC. 10. The public service commission shall prescribe forms of applications for certificates and licenses for the use of prospective applicants and shall make regulations for the filing thereof. The commission may designate one of its attorneys to take evidence at the hearing of any application for a certificate or license and submit findings of fact to the commission.

SEC. 11. Where a certificate or license shall have been regularly issued, and thereafter the carrier to whom the same shall have been issued, not being in default in the performance of any of the terms of this act, shall transfer or assign such certificate or license to another qualified hereunder, such certificate or license shall, upon application, be, by the commission, transferred to such assignee upon compliance by the latter with the terms of this act. Subject to any right a holder of any such certificate or license may have to engage in interstate commerce, no license or certificate issued in accordance with the terms of this act shall be construed to be either a franchise or irrevocable.

SEC. 12. No public motor carrier authorized by this act to operate shall discontinue any service established by this act without an order of the public service commission granted only after hearing upon due notice.

SEC. 13. In addition to the regular license fees or taxes imposed upon "public motor carriers of property or of passengers," "contract motor carriers of property or of passengers," and "private motor carriers of property," there shall be assessed against and collected from every such carrier a tax of five-tenths mill per gross ton mile for the administration of this act and for the maintenance, repair and reconstruction of the public highways. The said gross ton mileage shall be computed: (*a*) The maximum seating capacity of each passenger carrying vehicle shall be estimated at 150 pounds per passenger seat; to this sum shall be added the weight of the vehicle, the total shall then be multiplied by the number of miles operated, and the amount thus obtained divided by 2,000; (*b*) 200 per cent of the rated capacity of each property carrying vehicle plus the weight of the vehicle shall be

multiplied by the number of miles the vehicle is operated, and the amount thus obtained divided by 2,000.

SEC. 14. Motor carriers operating under a certificate and having paid their fees for the year 1931 shall receive credit for so much of the fees as have been paid under section 6 of chapter 206 of the Laws of 1925 for the last half of the year 1931.

SEC. 15. Every motor carrier to which this act applies shall keep daily records upon forms prescribed by the commission of all vehicles used during the current month. On or before the 25th day of the month following, they shall certify under oath to the commission, upon forms prescribed therefor, summaries of their daily records which shall show the ton miles traveled during the preceding month, and such other information as the commission may require. The daily records shall be filed and preserved for a period of at least three years, and thereafter until permission for their destruction shall have been given by the commission. Any person who shall willfully under oath make a false return to the commission shall be deemed guilty of perjury.

SEC. 16. The commission is hereby empowered to administer and enforce all provisions of this act, to inspect the books and documents of all carriers to which this act applies, and to expend such amount of the sum collected hereunder as is necessary for such purposes upon requisition by the commission to the state auditor: *Provided, however,* The total sum to be expended as provided in this section shall not exceed during the calendar year twenty per cent of the total gross sum collected under this act. It shall be the duty of the state treasurer to hold in reserve twenty per cent of all moneys collected hereunder during the calendar year for the purpose of meeting such expenditures.

SEC. 17. On or before the 25th day of each month all motor carriers shall pay to the commission on the amount of the fees due from them for the preceding month. If payment is not made on or before said date there shall be added as a penalty a sum equal to one and one-half per cent per month of the amount of the original fee. Said fees and penalties not paid on said date shall constitute a lien upon all the personal property of the delinquent carrier, and also upon the vehicles of all persons leased by it in its business, and thereupon said property and vehicles may be held under warrant issued by the commission and may be sold in accordance with the law applicable to personal property taxes. In addition thereto, such delinquency shall be a ground for the issuance of writ of attachment by any court of record against the carrier, and for the suspension or revocation by the commission of the certificate or license; said suspension or revocation may be ordered after a hearing by the commission held after a notice of not less than five days to all parties interested. The commission shall enforce collection of all fees and penalties provided in this act, and daily remit to the state treasurer the proceeds thereof.

SEC. 18. All moneys received under the provisions of this act shall be distributed: (*a*) For administration and enforcement of the provisions of this act, twenty per cent shall be held by the state treasurer for the use of the public service commission; (*b*) the balance the said treasurer shall place to the credit of the highway fund of the state and it shall become a part thereof.

SEC. 19. Any person who shall operate as any carrier to which this act applies without first obtaining a certificate or license or in violation of any of the terms thereof, or who fails to make any return or report required by this act or by the commission hereunder, or who

denies to the commission access to his books or records, shall be guilty of a misdemeanor and shall be punished as hereinafter provided.

SEC. 20. The commission is empowered to expend such money as may be necessary for the administration and enforcement of this act, but said sum shall not exceed the twenty per cent allowed to the commission in subparagraph (*a*) of section 18 hereof.

SEC. 21. No certificate or license shall be issued by the public service commission to any "public motor carrier of property," "public motor carrier of passengers," "contract motor carrier of property or passengers" or "private motor carrier of property," until and after such applicant shall have filed with, and the same has been approved by, the public service commission, a liability insurance policy in some insurance company or association authorized to transact business in this state, in such reasonable sum as the commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to pay compensation for injuries to persons and loss of or damage to property resulting from the negligent operation of such carrier. No other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city or town or other agency of the state.

SEC. 22. The commission shall promulgate and publish in the official state paper, and mail to each holder of a certificate or license hereunder, such regulations as it may deem necessary to properly carry out the provisions and purposes of this act. The commission may at any time, for good cause, suspend, and, upon at least five days' notice to the grantee of any certificate and an op-

portunity to be heard, revoke or amend any certificate. Upon the commission finding that any public carrier does not give convenient, efficient and sufficient service as ordered, such public carrier shall be given a reasonable time to provide such service before any existing certificate is revoked or a new certificate granted. Any rules promulgated by the commission shall include: (*a*) Every vehicle unit shall be maintained in a safe and sanitary condition at all times. (*b*) Every operator of a motor vehicle used as a public carrier shall be at least twenty-one years of age; and every operator of other carriers to which this act applies shall be at least sixteen years of age; and all such operators shall be of good moral character and fully competent to operate the motor vehicle under his charge. (*c*) Hours of service for operators of all motor carriers to which this act applies shall be fixed by the commission. (*d*) Accidents arising from or in connection with the operation of carriers shall be reported to the commission in such detail and in such manner as the commission may require: *Provided*, That the failure to report any such accident within five days after the happening thereof shall be deemed willful refusal to obey and comply with a rule of the commission. (*e*) The commission shall require and every carrier shall have attached to each unit or vehicle such distinctive marking as shall be adopted by the commission.

SEC. 23. Every carrier to which this act applies and every person who violates or who procures, aids or abets in the violating of any provision of this act, or who fails to obey any order, decision or regulation of the commission, or who procures or aids or abets any person in his failure to obey such order, decision or regulation, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not exceeding

$500. The inspectors designated by the commission shall have all the lawful powers of peace officers to enforce this act in any county or city of this state.

SEC. 24. It shall be the duty of the county attorneys to prosecute all violations of this act.

SEC. 25. Certificates issued to public carriers by the commission under the authority of chapter 206 of the Laws of 1925 shall remain in effect hereunder.

SEC. 26. All parts of chapter 206 of the Laws of 1925 and chapter 222 of the Laws of 1929 (being sections 66-196 to 66-1,107, inclusive, of the 1930 Supplement to the Revised Statutes of Kansas, 1923), inconsistent or in conflict with this act are hereby repealed.

SEC. 27. This act shall take effect and be in force from and after July 1, 1931, and publication in the statute book.

Approved March 16, 1931.

Published May 28, 1931.